

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 22873  
Docket Number CL-22950

Rodney E. Dennis, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and  
( Steamship Clerks, Freight Handlers,  
( Express and Station Employees  
(  
(St. Louis-San Francisco Railway Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-8820)  
that:

1. The Carrier acted in an arbitrary, capricious and unjust manner and violated the agreement between the parties when on July 21, 1978, it dismissed Clerk Don W. Johnston from the service of the company.

2. In view of the foregoing arbitrary, capricious and unjust action of the Carrier, it shall now be required to:

- (a) Restore Clerk Johnston to service with the Carrier with all seniority, vacation and other rights unimpaired.
- (b) Pay Clerk Johnston for all time lost commencing with July 19, 1978 and continuing until Clerk Johnston is restored to service.
- (c) Pay Clerk Johnston any amount he incurred for medical or surgical expenses for himself or his dependents to the extent that such payments could have been paid by Travelers Insurance Company under Group Policy No. GA-23000 and in the event of the death of Clerk Johnston pay his estate the amount of life insurance provided for under said policy. In addition, reimburse him for premium payments he may have made in the purchase of suitable health, welfare and life insurance.
- (d) Pay Clerk Johnston any amount he incurred for dental expenses for himself or his dependents to the extent that such payments could have been paid by Aetna Insurance Company under the National Dental Plan. In addition, reimburse him for premium payments he may have made in the purchase of suitable dental insurance.
- (e) Pay Clerk Johnston interest at the rate of 10% compounded annually on the anniversary of this claim for amounts due under (b) above.

OPINION OF BOARD: Claimant D. W. Johnston was regularly assigned to the Rotating Extra Board, headquartered in Carrier's General Stores Department at Springfield, Missouri. He was on vacation from July 3, 1978, to July 7, 1978. He worked in Carrier's Data Control Department on July 8 and 9, 1978. These two days were his regularly scheduled rest days.

Claimant was due to report to General Stores on July 10, 1978, at 7:30 a.m. He clocked in at 7:21 a.m. and was assigned by his foreman to cover a two-week vacancy in the Wheel Shop. At this point, claimant stated that he was sick and that he was going home. He clocked out at 7:37 a.m. and left the property.

Claimant returned to work on July 11 and, later that day, requested that he be relieved from his duties in the Stores Department so that he could cover an anticipated vacancy that would become available on July 17 in the Data Control Department. If claimant were released to cover the vacancy in Data Control, his pay for a period of two weeks would have been about \$400.00 more than he would earn on his regularly assigned duties in the stores department.

Carrier supervision became suspicious that claimant did not cover the job at the Wheel Shop because this would have meant that he would be required to stay on that job for a two-week period and would have been unable to take advantage of the Data Control vacancy. Thus, he would miss the opportunity to earn the extra pay resulting from that assignment.

On July 14, 1978, claimant was notified to report on July 19, 1978, for a formal investigation into the matter of his failure to work position No. 405 at the Wheel Shop. Claimant was charged with indifference to duty, insubordination, and dishonesty. The hearing was held as scheduled. As a result of the hearing, claimant was dismissed from service.

The Organization appealed Carrier's decision to dismiss claimant. At a conference in the Superintendent's office on July 19, 1978, Carrier offered to reinstate claimant with a loss of ten work days if the claim was dropped. Claimant refused this offer. On September 6, 1978, a similar offer was made by Carrier; claimant again refused. Carrier subsequently reinstated claimant on a leniency basis, effective September 18, 1978. The claim by the Organization, however, was not dropped. It has progressed through the grievance procedure and has been submitted to this Board for final resolution. Claimant was held out of service for a period of sixty days. This Board, therefore, is to decide whether Carrier had reason to suspend claimant for sixty days for his actions on July 10, 1978.

At the outset of this opinion, the Board is compelled to comment on the Organization's charge that the investigation held on July 19, 1978, was not a fair and impartial one, because Carrier was predisposed to find guilt and the hearing officer did not allow the General Chairman to record objections as the hearing progressed. Instead, he required him to hold his objections until he was called on to make a statement.

Carrier relies on Award No. 164, Public Law Board No. 405, to support its position on this issue. The Organization relies on Second Division Award No. 7606 to support its contention that denying the General Chairman a right to object in a timely manner was prejudicial to claimant's case. This Board is of the opinion that Carrier did meet the technical requirements of a fair hearing. The General Chairman's objections are recorded in the record and they will be taken into account by this Board when the merits of this case are considered. In this regard, we have followed the logic and reasoning utilized by the referee in Award No. 164.

Award 7606, cited by the Organization, clearly indicates that the General Chairman in that case was denied an opportunity to make objections and to cross-examine. That is not true in the instant case. This Board, however, does not condone the actions of the hearing officer in the present case. Justice would have been better served if the General Chairman had been allowed to record his objections in the record, as they came up, and not have been required to wait until the end of the hearing. A hearing on the property should be held in a fair and impartial manner and reasonable procedures should be followed by the hearing officer. In fact, this Board sees no danger in Carrier giving every opportunity for the claimant's representative to speak or to make what he thinks is a pertinent point on behalf of his client. By conducting a fair, impartial, and complete hearing, Carrier's labor relations policies became more credible. Such a hearing serves to improve the relationship between the union and carrier's representatives.

This Board has concluded, therefore, the claimant was not denied his substantive procedural rights as a result of the manner in which the July 19, 1978, hearing was conducted.

The issue on the merits of this case is whether the claimant is guilty of indifference to duty, insubordination, and dishonesty. A careful reading and analysis of the record reveals that Carrier has not carried its burden of proof; a sustaining award is in order.

Carrier has charged claimant with insubordination for failing to cover the assigned job in the Wheel Shop and for reporting off sick immediately after being given his assignment. The record, however, is barren

of any facts or statements that would allow this Board to conclude that claimant was insubordinate on July 10, 1978. His foreman assigned him his job. He stated that he was sick and that he was going home. His foreman replied, "OK". This exchange is recorded a number of times in the record and was not denied by Carrier.

The foreman clearly led the claimant to believe that his statement that he was sick and was going home was acceptable. The foreman did not question the honesty of claimant's statement. He did not object to claimant not covering the assigned job or to his leaving the property. He did not issue an order that was not followed, nor did he have any words of disagreement with claimant. He stated in the record that he had no reason to think claimant was not sick, even though he was not a doctor and could not be sure.

Claimant's behavior and his statements on July 10, 1978, were not so unusual that the foreman did not accept them as appropriate and true. If the situation had been otherwise, it would have been incumbent upon the foreman to take action at that time. If he thought claimant was malingering or attempting to avoid duty, he should have so stated at that point. Instead of complaining or instructing the claimant otherwise, he said "OK". That can only be construed to mean claimant had not violated any rules and the foreman was satisfied that claimant was sick.

Carrier, after the event, has put a number of facts together and has concluded that claimant was trying to avoid the assignment in the Wheel Shop so that he could cover the higher paid job in Data Control. This Board does not deny that this possibility may have existed, but the record does not contain any facts or probative evidence to support such a finding. Carrier has relied on supposition and suspicion to support its actions. This Division, as well as other Divisions of the Railroad Adjustment Board, has clearly stated on many occasions that mere suspicion is not sufficient justification on which to base discipline. Carrier must have substantial facts to support its action.

In reviewing Carrier's actions, this Board must rely solely on the record before it. If that record is barren of solid facts and substantial evidence that a claimant is guilty as charged, this Board cannot support the position of the Carrier. That is the situation in this case. The probative evidence contained in the record before us is insufficient to support the Carrier's position. Claimant was unjustly disciplined and should be compensated for all lost time. His record should be cleared of any reference to the incident.

Carrier makes the point that the claimant was offered an opportunity to return to work after a ten-day suspension and that at this point, Carrier's liability in this case should cease. Carrier argues that claimant has the obligation to mitigate damages. Consequently, he should have returned to work after the ten-day suspension. This Board agrees that claimants do have the responsibility to mitigate damages. It is a well-accepted principle applied by this Board, as well as by arbitration tribunals in almost every industry.

This obligation to mitigate damages, however, does not extend to the point that a claimant must drop his claim when reinstatement is offered. In the instant case, claimant was of the opinion that he was unjustly charged and he did not want to accept a ten-day suspension, drop his grievance, and have the discipline appear on his record. He had a perfect right to take this position. He, in effect, chose to "roll the dice." If he lost, he would have to suffer the consequences; if he won, he would be vindicated and his record cleared.

Claimant was justified in what he did and this Board cannot penalize him for being determined in his position and seeing his grievance through to a conclusion. What the Carrier did in this instance is make an offer of compromise. This is not unusual in grievance handling and frequently is sufficient to bring a case to a conclusion. But when an offer of compromise is made and refused, this refusal cannot be held against a party.

Carrier cites numerous awards in its submission wherein offers of reinstatement were refused by claimant and this Board considered those refusals and held them against claimant when the final decision was made. A reading of those awards, however, reveals that Carrier did not condition its offer on claimant dropping his claim, as was the situation in the present case.

After considering the entire record, it is the opinion of the Board that Carrier was not justified in disciplining claimant. Carrier has not carried its burden of proof. The record does not support a finding that claimant was insubordinate, dishonest, or indifferent to duty. Claimant should be reimbursed for all lost time at his appropriate rate in accordance with the requirements of Rule 31 of the controlling agreement. A request for compensation other than pay for time lost is not supported by the agreement and is consequently denied.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was violated.

A W A R D

Claim sustained in accordance with the Opinion of the Board.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST:

A.W. Pauls  
Executive Secretary

Dated at Chicago, Illinois, this 18th day of June 1980.